In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 181

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B 51–69) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. A petition for rehearing was denied on May 3, 1966. The petition for a writ of certiorari was filed on May 28, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory obligation imposed by 26 U.S.C. 4401 to pay an excise tax on wagers violates

the taxpayer's constitutional privilege against self-incrimination.

2. Whether the trial judge's instruction to the jury to keep deliberating, transmitted through the bailiff in the absence of the parties, required reversal of petitioner's conviction.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Western District of Pennsylvania, on fifteen counts charging the failure to pay the excise tax on wagers in violation of 26 U.S.C. 4401, on four counts charging the failure to pay the occupational tax in violation of 26 U.S.C. 4411, and on one count of conspiracy to commit the foregoing substantive offenses in violation of 18 U.S.C. 371. He was sentenced to imprisonment for a total of nine years, and was fined $191,000 (R. 385a–386a).[1] The court of appeals unanimously affirmed.

The evidence, which is not here in issue, disclosed that petitioner was the head of a large-scale "numbers" lottery operating throughout the Pittsburgh area. The operation did as much as $250,000 a week in business (R. 284b–285b). Although petitioner was aware of the requirements of the wagering tax laws (R. 269b–270b), he had never filed an occupational tax return or an excise tax return (R. 276b–277b, 279b–282b). His unpaid tax liability was at least $30,000.

[1] "R." refers to the printed appendices filed in the court of appeals. Page numbers with the suffix "a" denote the appellant's appendix; page numbers with the suffix "b" denote the appellee's appendix.

Trial of the case lasted for more than five weeks. On Wednesday, March 4, 1964, at approximately 4:15 p.m., the case was submitted to the jury. The jury deliberated until 11 p.m. The next morning, deliberations resumed, they continued until approximately 11:30 a.m., at which time the jurors sent the trial judge a note indicating that they were unable to agree on a verdict. The judge, through the bailiff, told the jury to continue its deliberations and immediately directed that counsel be informed of the note and his response. Within forty-five minutes the matter was reported to petitioner's counsel (R. 323a, 381a–382a). Counsel did not object to the procedure and made no attempt to preserve the jury's note or to ascertain the exact wording of the response. The jury continued its deliberations until 11 o'clock that night (R. 324a).

Shortly, thereafter, one of the jurors became ill and was afforded medical attention (R. 325a). The next morning the examining doctor informed the court that the juror would be able to resume work after a few hours rest. At a conference with the trial judge, petitioner's attorney moved for a mistrial and for the discharge of the jury on the ground that, because of the illness of the juror, further deliberations might result "in some sort of a compromise verdict" (R. 322a–323a). The motion was denied, and jury deliberations were suspended until the following day. At 2:50 p.m., Saturday, March 7, the jury met to resume its consideration of the case. Twenty-five minutes later, the bailiff handed the trial judge a note, interrupting a conference with counsel at which petition-

er's attorney had unsuccessfully renewed his motion for a mistrial based on the illness of the juror (R. 337a–339a). The following colloquy ensued (R. 345a–346a):

> The COURT. This is a statement addressed to me: "I am sorry to inform you that the jury has not been able to reach a verdict. We are deadlocked without any hope, we believe, of any change and feel it useless to deliberate any further. I am not familiar with procedure, but since the majority of the jurors feel that a meeting of the foreman with you might be helpful, I am making such a request."
>
> We can't have a meeting with the foreman, but if they want a meeting, they could all come into court, but I don't know what would be accomplished by that. So, I think we will just tell them we got their message and tell them to keep on working.
>
> Are there any further suggestions from anyone?
>
> Mr. MCLAUGHLIN [counsel for petitioner]. Well, we have all ready [*sic*] moved for a mistrial.
>
> The COURT. Tell them I have got their message and I suggest they keep on working.
>
> The BAILIFF. All right.

Petitioner's attorney thereupon resumed the interrupted discussion with the judge concerning the advisability of having the jury deliberate on Sunday (R. 346a). At approximately 8:30 that evening, the jury returned its verdict (R. 347a–349a). A poll confirmed that each juror assented to the verdict announced by the foreman (R. 349a–351a). The communication between the judge and the jury was first

objected to in petitioner's motion for a new trial, filed three days after the jury's verdict (R. 376a).

ARGUMENT

1. Petitioner's principal claim is that his conviction raises constitutional issues similar to those presented in *Costello* v. *United States,* No. 41, this Term, certiorari granted, 383 U.S. 942, and that this case should, therefore, be argued together with *Costello* (Pet. 5–8). The contention is unsound, however, because the offenses of which petitioner was convicted involved a failure *to pay* taxes, not, as did *Costello,* a failure *to register.* This distinction is crucial because it is only the compulsory registration which presents the self-incrimination issue decided by this Court in *United States* v. *Kahriger,* 345 U.S. 22, and in *Lewis* v. *United States,* 348 U.S. 419, and again presented for consideration in *Costello.* This Court has consistently sustained the legal obligation to pay taxes on income derived from unlawful sources notwithstanding the danger that, in making such a payment, the taxpayer might be supplying information which could be used in a prosecution against him. *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *United States* v. *Doremus,* 249 U.S. 86 (narcotics); *Souzinsky* v. *United States,* 300 U.S. 506 (firearms); *License Tax Cases,* 5 Wall. 462 (lotteries). If petitioner's claim were sound, taxpayers receiving income from unlawful sources would be privileged not to pay taxes on the ground that the disclosure resulting from a payment would be self-incriminatory. Compare, *e.g., James* v. *United States,* 366 U.S. 213; *Rutkin* v. *United States,* 343 U.S. 130.

Petitioner's real constitutional objection is not to the obligation that he pay the excise tax but to the requirement that he file a return. He was not, however, accused or convicted of the separate offense (see 26 U.S.C. 7203) of failing to file a return. Consequently, even if this Court were to decide in *Costello* that compulsory disclosure such as that involved in registration or in the filing of a return may, with regard to wagering, be protected by the Fifth Amendment, that would not excuse petitioner's offense of failing to *pay* the tax. Nor is petitioner afforded any additional basis for a constitutional challenge by the assertion that in paying the excise tax petitioner might disclose that he had failed to pay the occupational tax on wagering. A defendant may plainly not excuse a failure to comply with one legal obligation by asserting that compliance would disclose an earlier similar failure. On the same argument a taxpayer who failed to file an income tax return in one year might claim a privilege against ever filing thereafter.

2. The trial judge's reply to the jury's notes was not reversible error. The jury had five weeks of testimony and over 100 exhibits to review and to weigh in assessing petitioner's guilt or innocence on the 21 charged offenses (R. 328a). When the first note was sent, the jury had been deliberating less than nine hours. Thus, the judge's direction that they continue their deliberations—a matter within the sound discretion of the trial court—was plainly appropriate, and petitioner does not claim otherwise. Petitioner alleges only that in the transmission of the oral message through the bailiff it might have been garbled

or embellished and that prejudice must be presumed since the record does not show exactly how the message was repeated.[2]

While prejudice may be presumed where an unrecorded or an erroneous instruction on a substantive matter is privately communicated to a jury, the instruction here—to continue deliberations—was on a matter of procedure and was clearly appropriate in the form it was given to the bailiff. The record refutes petitioner's suggestion that it might have undergone a metamorphosis before being repeated to the jury. If, as petitioner suggests, the message given might have been understood as requiring deliberation until agreement was reached, it is unlikely that after another ten hours of consideration the jury would have found any purpose in again announcing its lack of agreement. Moreover, it is apparent that the first order to continue deliberating—the one attacked by petitioner—did not in fact occasion any agreement.

In any event, petitioner's counsel was informed of the note and response within 45 minutes of its delivery, but he entered no objection to the procedure, made no motion for a mistrial, and gave no indication that he wished to learn the exact terms used by the bailiff in repeating the judge's reply. Had he objected, the bailiff could have been examined immediately to secure his recollection while the matter was fresh. Moreover, the judge could have recalled the jurors and replied to their note in open court, ad-

[2] Petitioner questions the contents of the first note (Pet. 11), but the trial judge announced that it "stated that the jury could not agree. That is all they said" (R. 365a).

monishing them to disregard any previous reply communicated by the bailiff. Not only did petitioner's counsel fail to object and to afford the judge an opportunity to correct any possibility of error, but he tacitly sanctioned the identical procedure when it took place in his presence on the second occasion. Here "defense counsel had known of the incident * * * while [the jury] was deliberating, but had nevertheless stood mute, gambling on an acquittal while holding this issue in reserve." *United States* v. *Gersh,* 328 F. 2d 460, 463 (C.A. 2), certiorari denied *sub nom. Mugnola* v. *United States,* 377 U.S. 992. Under the circumstances, and absent any real probability of prejudice, petitioner should not be permitted to profit from his deliberate silence. *United States* v. *Gersh, supra; United States* v. *Woodner,* 317 F. 2d 649, 651 (C.A. 2), certiorari denied, 375 U.S. 903.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966